# Xcess Networks (M) Sdn Bhd v Huawei Technologies (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-1759–11 OF 2015
FAIZAH JAMALUDIN JC
20 SEPTEMBER 2017

*Contract — Breach — Refusal to accept delivery — Defendant entered into agreement to buy specified amount of modems — Defendant refused to accept delivery and in breach of contract — Whether damages to be assessed by court — Whether quotation form part of contract between parties*

*Contract — Damages — Measure of damages — No available market — How to determine amount of loss — Whether plaintiff entitled to claim pre-judgment contractual interest — Whether plaintiff entitled to late payment interest — Whether defendant liable for storage costs and expenses incurred for storing undelivered modems and liable for plaintiff's loss of preferential credit terms with US supplier pursuant to s 44 of the Sale of Goods Act 1957 — Whether plaintiff entitled for exemplary and aggravated damages*

This was an appeal by both the plaintiff and the defendant vide encl 21 and encl 31 respectively. The plaintiff and the defendant had entered into a Master Purchase Agreement for Engineering Services and Outsourcing Products ('the MPA') for the supply of EFM DSL Network Termination Unit ('the modems'). Pursuant to the MPA, the defendant sent a Request for Quotation ('the RFQ') to the plaintiff and the plaintiff issued their quotation ('the quotation') in reply to the RFQ. The defendant had ordered 1,000 units of the modems based on the quotation by issuing two purchase orders ('the POs'). The defendant took part-delivery of 500 units of modems and in breach of the contract, had refused to take delivery of the balance 500 units. The plaintiff filed this originating summons to compel the defendant to accept delivery of the balance 500 units of modems. By a judgment dated 21 December 2015, this court granted the plaintiff's application and ordered the defendant: (a) to accept delivery of the balance 500 units of modems; (b) to pay the plaintiff the agreed purchase price of USD769 (per unit) + GST (per unit), equivalent to USD815.14 (per unit) for the balance modems within 14 days of receipt of the modems; and (c) damages to be assessed and paid by the defendant to the plaintiff. Subsequently, the plaintiff's application for assessment of damages, the learned deputy registrar in his decision delivered on 17 February 2017 ordered that the defendant pay the plaintiff nominal damages in the sum of RM10,000 together with cost of RM1,500. Both the plaintiff and the defendant were

dissatisfied with the decision and hence this appeal. The issues for determination were: (i) whether damages were to be assessed by the court; (ii) how to determine the amount of loss; (iii) whether the quotation form part of the agreement between the parties; (iv) whether the plaintiff was entitled to the late payment interest; (v) whether the defendant was liable for storage costs and expenses incurred for storing the undelivered modems and liable for the plaintiff's loss of preferential credit terms with the US supplier; and (vi) whether the plaintiff was entitled for exemplary and aggravated damages.

**Held,** allowing the plaintiff's appeal in encl 21 and dismissing the defendant's appeal in encl 31:

(1) The plaintiff's claim was for general damages to be assessed by the court. The plaintiff was not claiming for loss of profit, which was special damages. There was no requirement for a claim for general damages to be specifically pleaded (see para 10).

(2) There was no available market for the modems and the plaintiff was contractually prohibited from selling the modems to a third party. The modems were special goods made to the defendant's specifications and the proprietary rights and intellectual property rights in the modems belonged to the defendant or its licensors as stated in article 13.1 of the MPA. It was not possible to determine what was the loss that would arise from the natural course of events and thus the amount of loss had to be determined based on the terms of the contract between the plaintiff and the defendant (see paras 19–21).

(3) There was no merit in the defendant's submission that the quotation did not form part of the agreement because the RFQ was filled in by the plaintiff on the defendant's system. It would not be logical for the plaintiff to issue an RFQ to itself to issue a quotation to the defendant. Furthermore, article 1.1 of the MPA defined that RFQ or Simple Request for Quotation ('SRFQ') were request for quotation sent by the defendant to the plaintiff for price quotation for the Services and/or Deliverable(s). The court also disagreed with the defendant's submission that the quotation did not form part of the agreement because of article 1.2(g) of the MPA. Article 1.2(g) specified the priority of the documents which form part of the agreement between parties in the event of discrepancy between the MPA and the order documents listed therein. Article 1.2(g) must be read together with article 1.1 which stated that the MPA, SRFQ and POs form part of the agreement (see paras 28–29).

(4) As the quotation was issued pursuant to the RFQ or SRFQ and the POs were issued pursuant to the quotation, it followed that the terms of the quotation also formed part of the agreement. Therefore, the MPA, the RFQ, the quotation, the POs, and the terms and conditions stipulated

therein formed the agreement between the plaintiff and the defendant for the supply of the modems (see para 30).

(5) The defendant should have taken delivery of the 500 units of modems on 7 July 2015 but the defendant's wrongful refusal to take delivery had deprived the plaintiff of the use of the monies that they would have received. Accordingly, the plaintiff was entitled to the late payment interest. Hence, the plaintiff's claim for pre-judgment interest for the balance of 500 units of modems which amounted to USD24,454.20 was allowed (see paras 38–40).

(6) The plaintiff's claim of loss of preferential credit terms with the US supplier was too remote but the claim for storage costs and expenses incurred for storing the undelivered modems was liable by the defendant. However, the plaintiff did not adduce any evidence to prove the amount of costs and expenses and it was submitted that the modems were stored on the plaintiff's own facilities pending delivery and no third-party storage costs were incurred. Thus, no damages were awarded (see paras 43–44).

(7) Despite submitting that the defendant's conduct of refusing the delivery as oppressive and malicious, no evidence was adduced by the plaintiff to show this. The defendant's conduct in not accepting the modems was not malicious or oppressive. Therefore, the plaintiff's claim for exemplary and aggravated damages were disallowed (see paras 46–47).

**[Bahasa Malaysia summary**

Ini adalah rayuan oleh kedua-dua plaintif dan defendan masing-masing melalui lampiran 21 dan lampiran 31. Plaintif dan defendan telah menandatangani Master Purchase Agreement untuk Perkhidmatan Kejuruteraan dan Produk Penyumberan Luar ('MPA') untuk pembekalan EFM DSL Network Termination Unit ('modem'). Menurut MPA tersebut, defendan telah menghantar Permintaan untuk Sebutharga ('RFQ') kepada plaintif dan plaintif mengeluarkan sebutharga mereka ('sebutharga') sebagai jawapan kepada RFQ tersebut. Defendan telah memesan 1,000 unit modem berdasarkan sebutharga tersebut dengan mengeluarkan dua pesanan pembelian ('PO'). Defendan menerima sebahagian penghantaran 500 unit modem dan dengan melanggar kontrak, telah enggan untuk menerima penghantaran baki 500 unit. Plaintif memfailkan saman pemula ini untuk memaksa defendan untuk menerima penghantaran baki 500 unit modem. Dengan penghakiman bertarikh 21 Disember 2015, mahkamah ini membenarkan permohonan plaintif dan mengarahkan defendan: (a) untuk menerima penghantaran baki 500 unit modem; (b) untuk membayar plaintif harga pembelian yang telah dipersetujui sebanyak USD769 (seunit) + GST (seunit), bersamaan USD815.14 (seunit) untuk baki modem dalam masa 14 hari selepas menerima modem; dan (c) ganti rugi yang akan dinilai dan dibayar

oleh defendan kepada plaintif. Seterusnya, permohonan plaintif untuk taksiran ganti rugi, timbalan pendaftar yang terpelajar dalam keputusannya yang disampaikan pada 17 Februari 2017 memerintahkan defendan membayar ganti rugi nominal berjumlah RM10,000 bersama-sama dengan kos RM1,500. Kedua-dua plaintif dan defendan tidak berpuas hati dengan keputusan tersebut dan dengan itu rayuan ini. Isu-isu penentuan adalah: (i) sama ada ganti rugi akan dinilai oleh mahkamah; (ii) bagaimana untuk menentukan jumlah kerugian; (iii) sama ada borang sebutharga membentuk sebahagian daripada perjanjian antara kedua pihak; (iv) sama ada plaintif berhak kepada faedah pembayaran lewat; (v) sama ada defendan bertanggungjawab ke atas kos dan perbelanjaan penyimpanan yang ditanggung untuk menyimpan modem yang tidak diterima dan bertanggungjawab terhadap kehilangan keutamaan terma kredit plaintif dengan pembekal US; dan (vi) sama ada plaintif berhak untuk ganti rugi teladan dan teruk.

**Diputuskan,** membenarkan rayuan plaintif didalam lampiran 21 dan menolak rayuan defendan didalam lampiran 31:

(1) Tuntutan plaintif adalah untuk ganti rugi am dinilai oleh mahkamah. Plaintif tidak menuntut kehilangan keuntungan, yang merupakan ganti rugi khas. Tiada keperluan bagi tuntutan ganti rugi am untuk dikemukakan secara khusus (lihat perenggan 10).

(2) Tiada pasaran tersedia untuk modem dan plaintif telah dilarang secara kontrak daripada menjual modem tersebut kepada pihak ketiga. Modem tersebut adalah barangan khas yang dibuat mengikut spesifikasi defendan dan hak milik dan hak harta intelek modem adalah milik defendan atau pemberi lesen sebagaimana dinyatakan dalam perkara 13.1 MPA. Adalah tidak mungkin untuk menentukan apa kerugian yang akan timbul dari rentetan peristiwa semulajadi dan dengan itu jumlah kerugian perlu ditentukan berdasarkan terma kontrak antara plaintif dan defendan (lihat perenggan 19–21).

(3) Tiada merit dalam hujahan defendan yang mana sebutharga tidak membentuk sebahagian daripada perjanjian kerana RFQ telah diisi oleh plaintif didalam system defendan. Adalah tidak masuk akal bagi plaintif untuk mengeluarkan RFQ kepada diri sendiri untuk mengeluarkan sebutharga kepada defendan. Tambahan pula, perkara 1.1 MPA menakrifkan RFQ atau Permintaan Ringkas untuk Sebutharga ('SRFQ') adalah sebutharga yang dihantar oleh defendan kepada plaintif untuk sebutharga untuk perkhidmatan dan/atau *deliverable(s)*. Mahkamah juga tidak bersetuju dengan hujahan defendan bahawa sebutharga tidak membentuk sebahagian daripada perjanjian kerana perkara 1.2(g) MPA tersebut. Perkara 1.2(g) menyatakan keutamaan dokumen yang membentuk sebahagian daripada perjanjian antara pihak-pihak

sekiranya berlaku percanggahan antara MPA dan dokumen yang disenaraikan didalamnya. Perkara 1.2(g) mesti dibaca bersama dengan perkara 1.1 yang menyatakan bahawa MPA, SRFQ dan PO membentuk sebahagian daripada perjanjian (lihat perenggan 28–29).

(4) Oleh kerana sebutharga dikeluarkan menurut RFQ atau SRFQ dan PO dikeluarkan menurut sebutharga, adalah diikuti bahawa terma sebutharga juga menjadi sebahagian daripada perjanjian. Oleh itu, MPA, RFQ, sebutharga, PO, dan terma dan syarat yang ditetapkan didalamnya membentuk persetujuan antara plaintif dan defendan untuk pembekalan modem (lihat perenggan 30).

(5) Defendan sepatutnya menerima penghantaran 500 unit modem pada 7 Julai 2015 tetapi keengganan yang salah oleh defendan untuk menerima penghantaran telah menghalang plaintif untuk penggunaan duit yang sepatutnya diterima. Dengan itu, plaintif berhak menerima faedah pembayaran lewat. Oleh itu, tuntutan plaintif bagi faedah pra-penghakiman untuk baki 500 modem yang berjumlah USD24,454.20 adalah dibenarkan (lihat perenggan 38–40).

(6) Tuntutan plaintif untuk kehilangan keutamaan terma kredit dengan pembekal US adalah terlalu terpencil tetapi tuntutan untuk kos dan perbelanjaan penyimpanan yang ditanggung untuk menyimpan modem yang tidak dihantar adalah tanggungjwab defendan. Walau bagaimanapun, plaintif tidak mengemukakan apa-apa keterangan untuk membuktikan jumlah kos dan perbelanjaan dan menghujahkan bahawa modem disimpan di fasiliti plaintif sendiri sementara menunggu penghantaran dan tiada kos penyimpanan pihak ketiga yang ditanggung. Oleh itu, tiada ganti rugi dianugerahkan (lihat perenggan 43–44).

(7) Walaupun dihujahkan bahawa kelakuan defendan menolak penghantaran sebagai penindasan dan berniat jahat, tiada keterangan yang diberikan oleh plaintif untuk membuktikan perkara ini. Kelakuan defendan untuk tidak menerima modem adalah tidak berniat jahat atau menindas. Oleh itu, tuntutan plaintif untuk ganti rugi teladan dan teruk adalah tidak dibenarkan (lihat perenggan 46–47).]

**Notes**

For cases on measure of damages, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4725–4738.

For cases on refusal to accept delivery, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3727–3728.

**Cases referred to**

*BHS Book Printing Sdn Bhd v Penerbitan IMT Sdn Bhd* [2016] MLJU 1880; [2016] 1 LNS 67; [2016] 1 AMR 753, HC (refd)

*Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177, KBD (refd)

*C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94, CA (refd)
*Enco Systems Sdn Bhd v Soon Hin Hardware Sdn Bhd* [2009] 9 MLJ 535; [2009] CLJ 218; [2008] 1 LNS 814, HC (refd)
*Hadley and another v Baxendale and others* [1843–60] All ER Rep 461; [1854] 9 Exch 341 (refd)
*John v Dharmaratnam* [1962] 1 MLJ 187; [1961] 1 LNS 35, CA (refd)
*Lachman v Pyarchand* AIR [1959] Rai 169 (refd)
*Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25, HL (refd)
*MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912; [1995] 2 AMR 1776, CA (refd)
*Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569; [1994] 4 CLJ 783, SC (refd)
*Percetakan Kolombong Ria Sdn Bhd v Wawasan Iktisas Sdn Bhd* [2016] 6 MLJ 584; [2017] 4 CLJ 302; [2016] 1 LNS 1482, CA (refd)
*Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd* [2015] 3 MLJ 753; [2015] 3 CLJ 291, FC (refd)
*Subramaniam a/l Paramasivam & Ors v Malaysian Airlines System Bhd* [2002] 1 MLJ 45; [2002] 1 CLJ 230, HC (refd)
*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15; [1994] 1 LNS 284, FC (refd)
*Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353; [1994] 1 LNS 160, HC (refd)
*Wasco Lindung Sdn Bhd v Lustre Metals & Minerals Sdn Bhd* [2015] 9 MLJ 610; [2015] 2 CLJ 427, HC (refd)

**Legislation referred to**

Civil Law Act 1956 s 11
Contracts Act 1950 s 74(1)
Rules of Court 2012 O 42 r 12
Sale of Goods Act 1957 ss 31, 44, 56, 61(2)(a)

*Mahendra Mahesan (Enoveetha Baskaran with him) (M Mahendra & Co) for the plaintiff.*
*Meor Amir bin Meor Omar Baki (Shukor & Assoc) for the defendant.*

**Faizah Jamaludin JC:**

INTRODUCTION

**[1]** These are my grounds of judgment in respect of the plaintiff's (encl 21) and the defendant's (encl 31) appeals respectively to judge in chambers against the order to the learned deputy registrar.

**[2]** On the plaintiff's application for assessment of damages, the learned deputy registrar in his decision delivered on 17 February 2017 ordered that the defendant pay the plaintiff nominal damages in the sum of RM10,000 together with cost of RM1,500.

**[3]** Both the plaintiff and the defendant were dissatisfied with the decision and appealed to judge in chambers vide encls 21 and 31 respectively. I heard both enclosures together. Having found merit in the plaintiff's appeal in encl 21, I allowed the plaintiff's appeal and awarded general damages of USD24,454.20 to the plaintiff with costs of RM5,000. I did not find any merit in the defendant's appeal in encl 31 and accordingly dismissed the defendant's appeal with no order as to cost.

BACKGROUND FACTS

**[4]** In this case, it is not disputed that there is a valid contract between the plaintiff and the defendant for the supply of the 1,000 units of modems. The defendant took part-delivery of 500 units of modems; and in breach of the contract, refused to take delivery of the balance 500 units.

**[5]** The plaintiff filed this originating summons to compel the defendant to accept delivery of the balance 500 units of modems.

**[6]** By a judgment dated 21 December 2015, this court granted the plaintiff's application and ordered the defendant:

(a) to accept delivery of the balance 500 units of modems;

(b) to pay the plaintiff the agreed purchase price of USD769 (per unit) + GST (per unit), equivalent to USD815.14 (per unit) for the balance modems within 14 days of receipt of the modems; and

(c) damages to be assessed and paid by the defendant to the plaintiff.

LIABILITY OF BUYER FOR REFUSAL TO TAKE DELIVERY OF GOODS PURCHASED

**[7]** Pursuant to s 31 of the Sale of Goods Act 1957 ('the SOGA') the plaintiff as the seller is under a duty to deliver the modems and the defendant as the buyer is under a duty to accept and pay for the modems in accordance with the terms of the contract of sale. Section 31 of the SOGA states that:

> 31 Duties of seller and buyer
>
> It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

**[8]** Section 44 of the SOGA states that a buyer is liable to a seller for any loss occasioned by the buyer's neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods. Under s 56 of the SOGA the seller can sue the buyer for damages for non-acceptance of the goods. Section 44 and s 56 of the SOGA states as follows:

> 44 Liability of buyer for neglecting or refusing delivery of goods
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> When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not, within a reasonable time after such request, take delivery of the goods, *he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods*: Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.
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> 56 Damages for non-acceptance
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> Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may sue him for damages for non-acceptance. (Emphasis added.)

ASSESSMENT OF DAMAGES

**[9]** The plaintiff's claim is for general damages to be assessed by this court.

**[10]** The defendant's counsel submits that the plaintiff is claiming for special damages which is not pleaded. With respect to learned counsel for the defendant, the plaintiff is not claiming for loss of profit, which is special damages. There is no requirement for a claim for general damages to be specifically pleaded.

**[11]** The Court of Appeal in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912; [1995] 2 AMR 1776 stated that there are two kinds of damages: general and special. Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal agreed with *Lachman v Pyarchand* AIR [1959] Rai 169 that:

> ... while special damages are required to be specifically pleaded and proved general damages are not.
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> General damages are damages which the law presumes to flow from, and as it were be the natural and probable consequence of the defendants' act.

**[12]** Azahar Mohamed FCJ in delivering the judgment of the Federal Court in *Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd* [2015] 3 MLJ 753; [2015] 3 CLJ 291 remarked:

> [55] The Court of Appeal, without reference to any of the aforesaid case law on market price differential, reversed the High Court's judgment, and found loss of profits, computed against a third party contract. This was plainly wrong. With all

due respect, the Court of Appeal failed to appreciate that *loss of profit was special damages, not general damages.* (Emphasis added.)

*Law on assessment of damages*

**[13]** The applicable legal principles for assessment of damages are as follows:

(a) the damages must not be too remote: see *Hadley and another v Baxendale and others* [1843–60] All ER Rep 461; [1854] 9 Exch 341; and s 74(1) of the Contracts Act 1950;

(b) the function of damages is to put the plaintiff in the same position as he would have been if he had not sustained the wrong: see *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25, which was followed with approval in *Subramaniam a/l Paramasivam & Ors v Malaysian Airlines System Bhd* [2002] 1 MLJ 45; [2002] 1 CLJ 230;

(c) the plaintiff should not be put in a better financial position than if the contract had been properly performed: see English Court of Appeal case of *C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94, which was followed with approval by the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15; [1994] 1 LNS 284; and

(d) the plaintiff must prove his loss: see *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177, which was applied with approval in *John v Dharmaratnam* [1962] 1 MLJ 187; [1961] 1 LNS 35 and in *Tan Sri Khoo Teck Puat*.

**[14]** Section 74(1) of the Contracts Act 1950, codifies the common law test for remoteness of damages set-out in the English case of *Hadley and another v Baxendale and others* [1843–60] All ER Rep 461; [1854] 9 Exch 341. It states that:

> 74 Compensation for loss or damage caused by breach of contract
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> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

**[15]** The rule for remoteness of damages as stated by Alderson B in *Hadley v Baxendale* is as below:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally ie

according to the usual course of things, from the breach of contract itself [the 1st limb], or such as may be reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it [the 2nd limb].

**[16]** Professor Cheong May Fong and Lee Yin Harn, in *Civil Remedies* (2nd Ed) at para [4.080] commented that:

> Nevertheless, in most cases, the Malaysian courts have regarded the position under section 74(1) as being the same as that in *Hadley v Baxendale*, despite the different phraseology of the second limb of section 74(1).
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> ...
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> Direct reference was made to the difference in the second limb of section 74(1) by the Supreme Court in *Malaysia Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569, where Mohammed Dzaiddin SCJ stated:
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> > [The] normal measure of damages for breach of contract in this country is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v Baxendale* ... For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v Baxendale*, which is, the party may recover damages which may 'reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract'. See *Associated Metal Smelters Ltd v Tham Cheow Toh* [1971] 1 MLJ 271.

**[17]** Based on s 74(1) of the Contracts Act 1950, a contracting party is entitled to claim loss or damage caused to him by the breach of the contract by his counterparty, which:

(a) naturally arose in the usual course of things; or

(b) the parties knew, or reasonably supposed to have known, such damages would likely result from the breach.

**[18]** The amount of loss depends on whether there is an available market for the goods or no available market for the goods:

(a) where there is an available market for the goods, the Federal Court in *Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd* [2015] 3 MLJ 753; [2015] 3 CLJ 291, held that the loss directly and naturally resulting in the ordinary course of events is the market price differential between the contract price and market price. The Federal Court held that the defendant's liability was for the difference between the contract price and the market price at the time and place fixed by the contract for the acceptance of the marine fuel oil ('MFO'). Azahar Mohamed FCJ in delivering the judgment of the Federal Court in *Scandinavian Bunkering* held that:

A

> [54] We adopt the principles as enunciated by the above mentioned cases [*Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39; [1967] 1 LNS 197, *Tan Chin Kim Sawmill and Factory Sdn Bhd & Anor v Lindeteves-Jacoberg (M) Sdn Bhd* [1980] 2 MLJ 204; [1980] 1 LNS 73, and *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495] that where there is an available market on the goods, general damages in the form of market price differential is recoverable by an innocent seller upon breach of contract on sale of goods by the buyer. Accordingly, on authority as well as on principle, there is no difference between English law and Malaysian law on the assessment of recoverable damages. *When there is an available market, pursuant to s 74(1) of the Contracts Act 1950, the loss directly and naturally resulting in the ordinary course of events is the market price differential.* (Emphasis added.)

B

C

(b) where there is clearly no available market, the Supreme Court in *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569; [1994] 4 CLJ 783 held that the loss is the contract price less the price at which the goods are eventually sold. Mohammed Dzaiddin SCJ in delivering the judgment of the Supreme Court said that:

D

> If there is clearly no available market, then consequential loss apart, the damages will be assessed at the contract price less the value of the goods at the time of the breach, which value is likely to be based upon the price at which the goods are eventually sold.

E

**[19]** However, in this case, not only is there no available market for the modems, the plaintiff is contractually prohibited from selling the modems to a third party. The modems were special goods made to the defendant's specifications and the intellectual property rights in the modems belongs to the defendant or its licensors. Article 13.1 of the MPA expressly states that the proprietary rights and intellectual property rights in the modems remains with the defendant or its licensors. Article 13.1 of the MPA states that:

F

G

> The Subcontractor's use of Deliverables [the modems] shall be restricted to the purposes authorized under this Agreement.

**[20]** Therefore, as the plaintiff can't sell the modems on the open market, it would not be possible to determine what is the loss that would arise from the natural course of events based on the measure of damages decided by the Federal Court in *Scandinavian Bunkering* and by the Supreme Court in *Malaysia Rubber Development*.

H

I

**[21]** The loss therefore, would have to be determined based on the terms of the contract between the plaintiff and the defendant.

*What are the terms of the contract between the plaintiff and the defendant?*

**[22]** In interpreting a contract between two parties, the Court of Appeal in *Percetakan Kolombong Ria Sdn Bhd v Wawasan Iktisas Sdn Bhd* [2016] 6 MLJ 584; [2017] 4 CLJ 302; [2016] 1 LNS 1482 held that the court should: A

> [28] ...
>
> (a) be entitled to take into account the circumstances surrounding the making of the contract, including the factual matrix that forms the background of the contract; B
>
> (b) adopt a common sense approach; and
>
> (c) discover the meaning of the agreement from the words which they have used read in the context of the circumstances in which they made the agreement. C

**[23]** The Court of Appeal in *Percetakan Kolombong Ria* held that the terms of contract between the parties were based on the appellant's letter of quotation, the respondent's letter of award, the appellant's letter of acceptance and the purchase order. Idrus Harun JCA in delivering the judgment of the Court of Appeal said: D

> [26] ... The essential point is that the court can gauge the meaning of the agreement from the words which the parties have used, the intention of the parties as evinced in the contemporaneous documents or from other relevant facts, taking into account the context of the circumstances which they made the agreement. E

**[24]** The Court of Appeal went on to hold that that the investment costs incurred by the appellant in order to perform the contract was not too remote as the respondent has the knowledge that the appellant would be making the investments in order to fulfill the respondents order. F

**[25]** In this present case, the defendant issued a letter of intention dated 5 September 2014 to the plaintiff stating that it will choose the plaintiff as its solution partner for the Telekom EFM Project. In the letter, the defendant wrote that the plaintiff's responsibility is to work closely with the defendant 'in providing relevant support in the form of expertise and product to secure the above-mentioned product'. And that 'Huawei in return guarantees that it will procure EPM modem and related hardware and software, NMS/EMS and engineering services ... for this project from Xcess Networks Malaysia Sdn Bhd only with agreed price by both parties'. G H

**[26]** The plaintiff and defendant then entered into a master purchase agreement for engineering services and outsourcing products ('MPA') dated 24 December 2014 whereby the plaintiff is to provide to the defendant the services and deliverables pursuant to the terms of the MPA. Pursuant to the MPA, the defendant sent a 'Request for Quotation' ('RFQ') dated 21 January I

2015 to the plaintiff for the import and delivery of EFM DSL Network Termination Unit ('the modem'). The plaintiff issued their quotation dated 21 January 20015 ('quotation') in reply to the RFQ and the defendant ordered 1,000 units of the modem based on the quotation by issuing two purchase orders (No 1031041834 and purchase order No 10310411837) dated 17 February 2015.

**[27]** The defendant argues that the quotation does not form part of the contract between the parties because the RFQ is filled in by the plaintiff on the defendant's system and because of article 1.2(g) of the MPA.

**[28]** With respect to learned counsel for the defendant, I don't find any merit in his submission that the quotation does not form part of the agreement because the RFQ is filled in by the plaintiff on the defendant's system. The RFQ was issued by the defendant to the plaintiff. It would not be logical for the plaintiff to issue an RFQ to itself to issue a quotation to the defendant. Moreover, it is expressly defined in article 1.1 of the MPA that 'RFQ' or 'SRFQ' means the request for quotation sent by the defendant to the plaintiff for price quotation for the services and/or deliverable(s). The relevant provision in article 1.1 is reproduced below.

> 'Request for Quotation' or 'RFQ' means the request for quotation sent by Huawei to the Subcontractor for price quotation for the Services and/or Deliverable(s).
>
> 'Simple Request for Quotation' or 'SRFQ' means the request for quotation sent by Huawei to the Subcontractor for price quotation for the Services and/or Deliverable(s).

**[29]** I have to also respectfully disagree with learned counsel for the defendant's submission that the quotation does not form part of the contract between the parties because of article 1.2(g) of the MPA. It is clear from the plain reading of article 1.2(g) that it sets out the priority of the documents which form part of the agreement between parties in the event of discrepancy between the MPA and the order documents listed therein. Article 1.2(g) must be read together with article 1.1, which expressly states that the MPA, SFRQ and POs form part of the agreement. Article 1.1 of the MPA states as follows:

> 'Agreement' means:
>
> (1) the present MPA (includes all appendixes attached thereto); and
>
> (2) SOW(s) or SRFQ(s) based on this MPA; and
>
> (3) Purchase Order(s) issued under above (1) and (2) of this definition; and
>
> Valid amendment(s) to above (1), (2) or (3) of this definition.

**[30]** As the quotation is issued pursuant to the RFQ or SFRQ and the PO is issued pursuant to the quotation, it follows that the terms of the quotation also forms part of the agreement between the parties. The Court of Appeal in *Percetakan Kolombong Ria* after 'taking into account the context of the circumstances which (the parties) made the agreement' held that the quotation issued by the appellant in that case formed part of the agreement between the parties. Accordingly, this court finds that the MPA, the RFQ, the quotation and the two POs, and the terms and conditions stipulated therein, forms the agreement between the plaintiff and the defendant for the supply of the modems.

**[31]** The terms and conditions in the quotation are as below:

| | |
|---|---|
| Delivery: | 8–12 weeks from date receipt of valid purchase order |
| Validity: | 36 months. This Quote will expire on January 20th, 2018 |
| Payment Mode and Terms: | 80% within 6 days from submission date of official purchase order, original invoice & proof of delivery signed by Huawei. |
| | 1% interest per month will be charged if Huawei failed to pay within 6 days from delivery date. |
| | 20% within 10 days from acceptance date. 1% interest per month will be charged if Huawei failed to pay within 10 days from delivery date |
| Currency: | USD |
| Warranty: | 12 months from delivery date |

**[32]** Both POs had, inter alia, the following terms:

| | |
|---|---|
| Payment Terms/Tax Rate: | 80% within 6 working days from Invoice accepted by HW [Huawei]: 20% within 10 working days from [sic] |

**[33]** As discussed above, under s 31 of the SOGA, it is the duty of the plaintiff as the seller to deliver the goods and the defendant as the buyer to accept and pay for the goods in accordance with the terms of the contract of sale. The defendant in breach of the contract of sale, refused to take delivery of the balance 500 modems. The defendant knew that pursuant to the MPA and the POs, the plaintiff had ordered the modems from the manufacturer in the United States specifically to meet the defendant's purchase order.

**[34]** The evidence shows (which is undisputed by the defendant) that the plaintiff in a letter dated 29 June 2015 addressed to Mr Wu Shaolin, the defendant's Head of Procurement stating that:

> We are writing this letter to inform Huawei that 700 units of EFM Modems under Purchase Order Number 1031041837 is awaiting delivery to Huawei.
>
> Xcess Networks (M) Sdn Bhd have received the modem in our office on 7th May 2015. The modems have been inspected by Telekom Malaysia T&I Personnel without any failure on 22nd May 2015.
>
> Please take note that we have communicated the readiness of modem shipment to Huawei PM multiple times but have not received any approval to ship out the modems. The Warranty Period of the Modem will start 60 days from us receiving the shipment. We have provided 60 days allowance for shipping and testing.
>
> We will proceed to ship the EFM Modems to Huawei on 7th of July 2015.

*Pre-judgment contractual interest*

**[35]** In *Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353; [1994] 1 LNS 160, the High Court allowed the plaintiff's claim of 1.5% per month for the overdue account. Haidar J (as he then was) held that this is because it was clearly indicated on the invoices submitted to the plaintiff and there was no protest by the defendant when the invoices were presented to it. The decision in *Tansa Enterprise* was followed in *Enco Systems Sdn Bhd v Soon Hin Hardware Sdn Bhd* [2009] 9 MLJ 535; [2009] CLJ 218; [2008] 1 LNS 814. The High Court allowed the plaintiff's claim in that case for late payment interest as it was endorsed on the delivery orders and invoices.

**[36]** Both these judgments were referred to with approval by the High Court in *BHS Book Printing Sdn Bhd v. Penerbitan IMT Sdn Bhd* [2016] MLJU 1880; [2016] 1 LNS 67; [2016] 1 AMR 753, where it was held that a vendor of goods may claim pre-judgment interest on the price of the goods from the purchaser under s 61(2)(a) of the SOGA and s 11 of the Civil Law Act 1956. The learned JC in *BHS Book Printing Sdn Bhd* referred to the decision in *Wasco Lindung Sdn Bhd v Lustre Metals & Minerals Sdn Bhd* [2015] 9 MLJ 610; [2015] 2 CLJ 427 and held that a vendor can also claim post-judgment interest on the price of goods from a purchaser pursuant to O 42 r 12 of the ROC.

**[37]** It is a function of damages that the injured party should be put in the same position as it would have been if it had not sustained the wrong (as discussed in para 13(b) above). In this case, the plaintiff should not be put in a worse position by the defendant's wrongful refusal to accept the balance 500 modems. The 700 modems were ready for delivery to the defendant since May 2015. 200 of the balance 700 units of modems were delivered in July 2015. The defendant only took delivery of the balance 500 units in January 2016 after it was ordered to do so by this court.

**[38]** The plaintiff is entitled under the terms of the contract to charge 1% per month if the defendant failed to pay 80% of purchase price within six days and 20% of the purchase price within ten days of the delivery date. This court had ruled that the defendant had wrongfully refused to take delivery of the 500 units of modems. The defendant should have taken delivery on 7 July 2015, which is the date that the plaintiff said in its letter that it would ship the modems to the defendant. If the defendant had accepted the modems in July, it would have had to pay the plaintiff 80% of purchase price within six days and 20% of the purchase price within ten days of the delivery date. The defendant's wrongful refusal to take delivery of the 500 modems had deprived the plaintiff of the use of the monies that they would have received in July 2015.

**[39]** Furthermore, the parties knew or reasonably supposed to have known, that such damages would likely result from the defendant's wrongful refusal to take delivery of the 500 modems 'taking into account the context of the circumstances which they made the agreemen' (per Idrus Harun JCA in *Percetakan Kolombong Ria*). Accordingly, in my view, under the second limb of s 74(1) of the CA and the second limb of *Hadley v Baxendale*, the plaintiff is entitled to the late payment interest.

**[40]** For the reasons above, I allow the plaintiff's claim for pre-judgment interest for the balance 500 units of modems at the rate of 1% per month from August 2015 to the date of delivery on January 2016, which amounts to USD24,454.20. The calculation is as below:

| |
|---|
| 1% x 500 units x USD815.14 x 6 months (Aug 2015 – Jan 2016) = USD24,454.20 |

*Storage costs*

**[41]** The plaintiff's group general manager in his witness statement stated that they had to incur additional costs and expenses to store the undelivered modems and they also lost their preferential credit terms with the supplier in the US because of the defendant's non-acceptance and non-payment of the balance modems.

**[42]** Furthermore, under s 44 of the SOGA the defendant is liable to the plaintiff for any loss suffered by the plaintiff including 'a reasonable charge for the care and custody of the goods' by its neglect or refusal to take delivery of the modems.

**[43]** Based on the above, this court finds that the defendant is liable to the plaintiff for any storage costs and expenses incurred for storing the undelivered

modems. But the other losses that the plaintiff claims to have suffered such as the loss of preferential credit terms with the US supplier is in my view, too remote.

**[44]** However, the plaintiff did not adduce any evidence to prove to this court the amount of costs and expenses it has incurred to store the balance modems when the plaintiff refused to take delivery. As held by the Federal Court in in *Tan Sri Khoo Teck Puat*, the plaintiff must prove his loss. Furthermore, counsel for the plaintiff submitted that the modems were stored in the plaintiff's own facilities pending delivery and no third party storage costs were incurred. Therefore, no damages is awarded to the plaintiff for the storage costs and damages it claims to have incurred.

*Exemplary and aggravated damages*

**[45]** The plaintiff also claims for exemplary damages and aggravated damages. The plaintiff's counsel submits that the defendant's conduct was 'very oppressive, outrageous and appalling' in refusing to accept delivery of the modems when the plaintiff had given notices of its intention to deliver the modems. The plaintiff also claims that the defendant's conduct had placed them a 'humiliating and malicious circumstances' with its suppliers in the USA.

**[46]** With respect to learned counsel for the plaintiff, I do not agree that the defendant's conduct in not accepting the modems was malicious or oppressive. No evidence was adduced before this court to show malice or oppression by the defendant in refusing to take delivery of the balance 500 units of modems.

**[47]** Accordingly, this court disallows the plaintiff's claim for exemplary and aggravated damages.

CONCLUSION

*Enclosure 21*

**[48]** For the reasons above, this court allows the plaintiff's appeal and award general damages of USD24,454.20 to the plaintiff.

**[49]** The plaintiff's claim for exemplary and aggravated damages is disallowed.

**[50]** No damages are awarded to the plaintiff for storing the balance units of modems pending delivery of the modems to the defendant.

**[51]** Costs of RM5,000 is to be paid by the defendant to the plaintiff subject to the payment of the allocator fee.

*Enclosure 31*

**[52]** I did not find any merit in the defendant's appeal. Accordingly, the defendant's appeal is dismissed with no order as to costs.

*Plaintiff's appeal in encl 21 allowed; defendant's appeal in encl 31 dismissed.*

Reported by Ahmad Ismail Illman Mohd Razali